United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1381

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P/S

To be argued by
Mark A. Varrichio

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

IN RE JOSEPH MILLOW;

A witness before the Grand Jury

Witness-Appellant.

Criminal Action
Case No. M11-188

APPELLANT'S BRIEF

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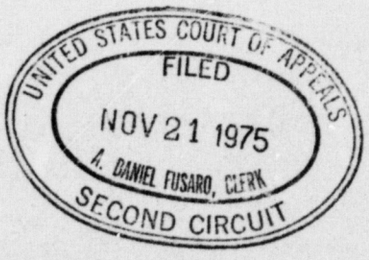

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ISSUES PRESENTED FOR REVIEW

1. Is the appellant required to answer questions propounded to him by the government in a Grand Jury proceeding, when the government has conceded that the questions are based on electronic surveillance and physical surveillance over a two year period and the government obtained an order for electronic surveillance approximately one year ago?

2. Once a witness, before the Grand Jury, claims that there has been illegal electronic surveillance, does the government then have to supply affidavits from involved government investigative agencies denying any such illegality in addition to any statement by the prosecutor?

3. Is defendant entitled to bail?

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

In Re JOSEPH MILLOW;

A Witness before the Grand Jury,

Witness-Appellant.

APPELLANT'S BRIEF

STATEMENT OF FACTS

The appellant, Joseph Millow, was served with a subpoena to testify before the Federal Grand Jury and moved to quash the subpoena which motion was denied on October 28, 1975, by Hon. Lawrence W. Pierce, Judge of the United States District Court, Southern District of New York. On October 29, 1975, the appellant refused to testify after being granted use immunity and on October 31, 1975, he was held in civil contempt by Judge Pierce. Bail was denied by Judge Pierce on the grounds that the appeal would be frivolous and taken for delay. The appellant filed notices of appeal on October 31, 1975, of the civil contempt order and the denial of bail.

On November 11, 1975, the appellant filed a notice of motion for bail pending appeal. This motion was heard before the Second Circuit Court of Appeals on November 14, 1975, and bail was again denied to the appellant. This appellant's brief is submitted in support of the appeal on the merits of the order of contempt and the denial of bail.

ARGUMENT

POINT I

(a) THE ORDER OF CONTEMPT SHOULD BE VACATED ON THE GROUNDS THAT THE GOVERNMENT HAS CONCEDED THAT THE ELECTRONIC SURVEILLANCE OF APPELLANT WAS UNLAWFUL.

In Re Persico, 491 F. 2d 1156 (2d Cir. 1974), where the court refused to look behind the legality of court ordered surveillance of a witness who was subsequently held in civil contempt pursuant to 28 USC Section 1826(a), is similar to the instant case, but can be distinguished on the facts and the law. In In Re Persico, the witness made a motion to suppress the contents of electronic surveillance under 18 USC Section 2518(10)(a). The court held that a witness before the Grand Jury could not make such a motion and a plenary suppression hearing would not be granted.

The court said at page 1161:

> "As noted, though Congress prescribed that illegal wiretap evidence must be excluded from all grand jury proceedings, hearings to suppress evidence were not to be permitted during such proceedings. These seemingly inconsistent policy determinations can be reconciled only by interpret-

> ing the statute as requiring exclusion only when it is clear that a suppression hearing is unnecessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent,..."

It is argued that in the instant case the Government has conceded that the surveillance was not in conformity with statutory requirements. When the appellant appeared before the Grand Jury on October 29, 1975, the Assistant United States Attorney said,

> "I also want to advise you, Mr. Millow, that you are the target of this investigation and that my questions here today were based on electronic surveillance, physical surveillance of your movements in the past two years by the Federal Bureau of Investigation and law-enforcement officials, witnesses before this grand jury and things that you have made to myself, Mr. Emory and Special Agent Douglas Wilhelmy." (See Appendix to Brief)

This statement says that there has been illegal electronic surveillance since the wiretap was only authorized on November 8, 1974, so that two years of electronic surveillance would make the wiretap illegal.

It is argued that if the above statement by the Assistant United States Attorney is not held to be a concession by the Government of illegal electronic surveillance, then a plenary suppression hearing should be held to determine the legality. Since In Re Persico was decided, there have been no cases found where the Government produced a court order authorizing electronic surveillance when the witness refused to testify,

claiming illegal electronic surveillance. In two recent cases in point, United States v. Grusse, 515 F 2d 157 (1975), and In Re Buscaglia, 518 F 2d 77 (1975), the witness claimed illegal surveillance and the Government denied any surveillance at all. But Judge Oakes in a dissenting opinion in Grusse pointed the way to a full plenary hearing, saying at page 160;

> "Instances in this and other courts of denials by the government that any such surveillance took place, later replaced by retractions, emphasize the need for stricter safeguard in this area....I would remand for a hearing...."

Although Judge Oakes distinguished In Re Persico because of the presence of the court order, it is argued that the Assistant United States Attorney's statement quoted above casts a shadow over the court order in the instant case and that a full hearing is required to determine the issue.

(b) IN THE ALTERNATIVE, THE ORDER OF CONTEMPT SHOULD BE VACATED UNLESS THE GOVERNMENT CAN SHOW THAT THERE HAS BEEN NO ILLEGAL ELECTRONIC SURVEILLANCE OF THE APPELLANT AND THAT THE EXISTENCE OF THE APPELLANT WAS NOT LEARNED OF THROUGH ELECTRONIC SURVEILLANCE.

In cases decided since In Re Persico the court has held that where a witness alleges that he was a victim of unlawful wiretapping conducted at the direction of United States employees in violation of his constitutional rights, he was entitled to invoke 18 USC Section 3504. (See United States v. Toscanino, 500 F 2d 267 (1974)). While In Re Persico dealt with a motion to suppress under 18 USC Section 2518(10)(a),

18 USC Section 3504 requires merely a "claim" by the witness that there has been illegal electronic surveillance, which claim has been made in the present case. Toscanino says at page 281;

> "The district court was obligated to direct the prosecutor to put his oral denial of the allegation in affidavit form, indicating which federal agencies had been checked...."

It is argued in the instant case that the order of contempt should be vacated unless the Government makes such a check of government agencies. So far the Assistant United States Attorney has sworn that he is not aware of any illegal electronic surveillance, but he is not the official who procured the court order of November 8, 1974, authorizing the wiretap, nor did he conduct the investigation. In United States v. Grusse, cited earlier, Judge Lumbard in a concurring opinion said at page 159:

> "I think that the assistant United States attorney handling a case and the FBI agent in charge of the investigation of a case are the two people most likely to know if the fruits of any electronic surveillance were used to gain information on which the grand jury would base its questions."

In addition, Judge Lumbard alludes to a broad affidavit used in the Southern District which apparently is the "eight agency search" that Judge Oakes refers to in his dissenting opinion in the same case. There certainly has been no such affidavit presented in the instant case.

In the most recent case in point, In Re Buscaglia, 518 F 2d 77 (1975), this court found there was no illegal

electronic surveillance after the FBI agents and the Organized Crime Strike Force had submitted affidavits.

POINT II

IF THE ORDER OF CONTEMPT IS NOT VACATED ON THE MERITS, THEN BAIL SHOULD BE SET FOR THE APPELLANT ON THE GROUNDS THAT APPEAL TO THE SUPREME COURT WOULD NOT BE FRIVOLOUS OR TAKEN FOR DELAY.

All the above arguments and law presented in Point I supra apply to this point.

CONCLUSION

It is therefore argued that if the contempt order is not vacated immediately, as argued earlier, then the order should be vacated if the government does not make the thorough search called for in recent cases and submit affidavits from the investigative agencies, not just the prosecutor, that there has been no illegal electronic surveillance.

Further, whether or not this appeal is successful, that if no such relief is ordered, then a reasonable bail should be set on the ground that an appeal would not be frivolous or taken for delay. (See In Re Tierney, 465 F 2d 806 (1972), 409 US 1232, 93 S.Ct. 17.)

Respectfully Submitted,

MARK A. VARRICHIO,
Attorney for
Witness-Appellant

Dated: Bronx, New York
November 20, 1975

APPENDIX

Title 18 USCA, Section 3504

Section 3504. Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States---

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibilty; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitu-

tion or laws of the United States or any regulation or standard promulgated pursuant thereto.

Title 28 USCA, Section 1826

Section 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of ---

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Title 18 USCA, Section 2518(10)(a)

Section 2518. Procedure for interception of wire or oral communications

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officier, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that---

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.